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IN THE

Supreme Court of the United States

October Term, 1964

No. 539

HOUSE, GROSSMAN, VORHAUS & HEMLEY

and

EDWARD M. GARLOCK,

Petitioners,

against

HUDSON & MANHATTAN CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT HUDSON & MANHATTAN CORPORATION IN OPPOSITION

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Opinions Below

The opinion of the District Court, dated December 27, 1963, is reported at 224 F. Supp. 815 (Pet. 21-72).[1] The Court of Appeals denied petitioners leave to appeal on March 6, 1964 (Pet. 73) and by separate orders dated April 28, 1964 denied their petition for rehearing and for rehear-

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[1] References to pages in the petition and the exhibits appended will be cited as "Pet. "; references to pages in the appendix filed by petitioners will be cited as "App. ."

ing in banc (Pet. 74, 75). By order dated June 19, 1964, the Court of Appeals amended its order of April 28, 1964 to add "Petition for leave to file out of time granted" (Pet. 76).

Jurisdiction

On July 27, 1964, petitioners applied for an extension of time to file a petition for a writ of certiorai to September 28, 1964. Mr. Justice Harlan, by order dated August 1, 1964, extended the time to and including September 25, 1964. The petition for a writ of certiorari was filed on September 25, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statute Involved

Relevant provisions of the Bankruptcy Act, 11 U. S. C. § 62 *et seq.* are set forth in the petition at pages 3-8.

Questions Presented

(1) Sections 241-243 of the Bankruptcy Act confer the power solely upon the District Court, in the exercise of a sound discretion, to allow reasonable compensation for beneficial services rendered by a participant in a corporate reorganization proceeding under Chapter X. Section 247 provides for a hearing for the consideration of applications for allowances on notice to the applicants, other interested parties and the Securities and Exchange Commission (Commission).

In granting allowances in the instant proceeding, the District Court expressly stated that it gave great weight to the recommendations of the Commission (Pet. 34) and was generally in agreement therewith (Pet. 70-73). In the case of these petitioners the Court granted an allowance

of $50,000, an amount which exceeded or equalled that to any other bondholder representative, with one exception. The Commission had recommended that the allowance be $100,000 and Company counsel that it be $25,000 (Pet. 50).

The question presented is whether the fact that the District Court made an allowance of $50,000 when the Commission recommended that it be $100,000 is so patent an abuse of discretion that the denial of leave to appeal by the Court of Appeals is in itself an abuse of discretion that requires the exercise of this Court's power of supervision.

(2) Section 62(c) of the Bankruptcy Act provides that any attorney rendering services in a proceeding under the Act shall not share or agree to share his compensation with any person not contributing thereto, with the proviso that an attorney may share his compensation with a forwarding attorney.

Section 62(d) provides that if the court is satisfied that a petitioner for allowances has violated the provisions of subd. (c), the court shall withhold all compensation.

In the instant case petitioners, the law firm and the individual practitioner, entered into a voluntary agreement to share equally in any fee received. They also agreed with a Mr. Schnur, the forwarding attorney, who spent a relatively small amount of time on the matter, to give him 8% of the fee (Pet. 50; App. 38a). The Commission, in its advisory report to the Court, recommended that the agreement for equal division not be disturbed even though it was quite clear that the individual practitioner had rendered the greater amount of the services. However, it expressed the view that the 8% agreement with Mr. Schnur be judicially superseded and that he be limited to an allowance of $1,500 (App. 38a). The Court determined that neither agreement required judicial intervention (Pet. 50).

The question presented is whether the voluntary agreement made by petitioners with the forwarding attorney is so unconscionable that the refusal of the District Court to set it aside is so patent an abuse of discretion that the denial of leave to appeal by the Court of Appeals is in itself an abuse of discretion that requires the exercise of this Court's power of supervision.

Statement

At the conclusion of a lengthy reorganization proceeding the District Court awarded final allowances aggregating $1,162,700. The Court did so in a lengthy opinion in which it carefully reviewed the services performed by each of the applicants (Pet. 21-72).

The District Court had before it and fully considered in connection with all applications for allowances, (1) the record of the entire proceedings containing the participation of each applicant, with which the Court was in the main personally familiar by reason of its supervision of the proceedings; (2) the applications for allowances, augmented by the testimony of the applicants, which gave the Court all that the applicants could say or wished to say in support of their applications; (3) a full statement by counsel for the Securities and Exchange Commission which analyzed in detail all the applications and the services rendered by the applicants and gave the Commission's recommendation in each case; (4) a memorandum from Company counsel analyzing each application and the services rendered by each applicant and containing the recommendation of counsel.

The Court found the analyses made by counsel for the Commission and counsel for the Company helpful and recognized the particular weight which should be given to the recommendations of the Commission (Pet. 34). The Court was generally in agreement with counsel for the

Commission, but not invariably so, and some of its awards were above and others below the Commission's recommendations.

The petitioners were granted an allowance of $50,000 by the District Court (Pet. 50). They jointly represented the three petitioning creditors in the filing of an involuntary petition in bankruptcy and Mr. Garlock had the laboring oar in the lengthy litigation that ensued in sustaining the petition. After the petition had been approved they continued in the proceeding as counsel for the three creditors, who were the holders of $46,000 face amount of refunding mortgage bonds, an issue also represented by the Indenture Trustee and two committees. The Court acknowledged the beneficial nature of petitioners' services in filing and sustaining the original petition in bankruptcy, but concluded that the work they did thereafter was not of substantial importance or value to the estate (Pet. 48-50).

The allowance of $50,000 exceeded or equalled that to any other bondholder representative with the exception of the allowance of $65,000 to counsel for the Indenture Trustee of the refunding mortgage bonds (Pet. 70-72).

Eight of the applicants petitioned the Court of Appeals for leave to appeal from the allowance determination made by the District Court. The Court of Appeals was also advised of the views of the Commission (App. 63a). Two of the petitions were granted and six denied, including that of these petitioners (Pet. 73). The Court denied a petition for rehearing and a petition for rehearing in banc.

Argument

(1) Petitioners have tendered no question requiring review by this Court. The determination of the District Court represented its carefully considered appraisal of a reasonable allowance. The Court of Appeals, finding no abuse of discretion or error of law, denied leave to appeal.

Much could be said concerning the services and also, unfortunately, the disservice (Pet. 40-50) of petitioners to this proceeding. But such matters concern purely factual issues affecting quantum. This Court does not sit to review such issues.

(a) Petitioners would have it that the disparity between the District Court's allowance and the Commission's recommendation of itself is evidence of an abuse of discretion requiring review by the Court of Appeals. Such is not the law.

No Court of Appeals has accorded greater weight to the recommendations of the Commission than has the Second Circuit (*Surface Transit, Inc.* v. *Saxe, Bacon & O'Shea*, 266 F. 2d 862, 865 [1959]).

The District Court, in fixing allowances, expressly adhered to that policy (Pet. 34), but the recommendations of the Commission are only advisory. The statute places the responsibility for the exercise of a sound judicial discretion upon the District Court alone (*Dickinson Industrial Site, Inc.* v *Cowan*, 309 U. S. 382, 389 [1940]). That Court properly performed its function and the Court of Appeals found no abuse of discretion requiring its review.

(b) Petitioners claim (Pet. 16, 17) that the District Court denied them the status of class representation when it noted that once the bankruptcy petition had been approved their subsequent participation in the proceeding was as counsel for three holders of refunding mortgage bonds (Pet. 49). The Court in making this statement of fact, did not deny petitioners any standing but made only a relevant observation on the nature and importance of their services

These petitioners, in their supplemental application for allowances claimed priority of status over all other representatives of refunding bondholders, with the exception of counsel for the indenture trustee, for the reason that they

were counsel for the original petitioning creditors (App. 21a). It was in answer to this contention that the District Court stated that once the bankruptcy petition had been approved their status as counsel for petitioning creditors terminated, for their role had been performed, and their subsequent participation had no priority over that of any other representative of the class (Pet. 49). The Commission agreed with this conclusion in its memorandum to the Court of Appeals (App. 75a).

(c) Petitioners complain that the District Court drew a distinction between counsel for an indenture trustee and other representatives of the class (Pet. 17). But this very distinction was made by petitioners themselves in their supplemental application for allowances (App. 21a) when petitioners sought to place themselves and counsel for the indenture trustee in a position of priority over all other representatives of the class.

(2) Petitioners also contend that the refusal of the District Court to set aside their agreement with the forwarding attorney was so patent an abuse of discretion that the denial of leave to appeal by the Court of Appeals requires the issuance of a writ. The contention is wholly without merit.

No violation of Section 62(c) of the Bankruptcy Act is involved and had there been, these petitioners could hardly complain that the Court did not impose the sanctions of Section 62(d).

Undoubtedly the District Court had the general equitable power in the exercise of its discretion to set aside the voluntary agreement made. It determined that the situation was not one that required it to do so. The Court of Appeals saw no need to review that decision. Its conclusion in no way conflicts with *Surface Transit, Inc.* v. *Saxe, Bacon & O'Shea*, 266 F. 2d 862, 866 (C. A. 2, 1959).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated October, 1964.